

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Use of Spectrum Bands Above 24 GHz For)	GN Docket No. 14-177
Mobile Radio Services)	
)	
Establishing a More Flexible Framework to)	IB Docket No. 15-256
Facilitate Satellite Operations in the 27.5-28.35)	
GHz and 37.5-40 GHz Bands)	
)	
Petition for Rulemaking of the Fixed Wireless)	RM-11664
Communications Coalition to Create Service)	
Rules for the 42-43.5 GHz Band)	
)	
Amendment of Parts 1, 22, 24, 27, 74, 80, 90,)	WT Docket No. 10-112
95, and 101 To Establish Uniform License)	
Renewal, Discontinuance of Operation, and)	
Geographic Partitioning and Spectrum)	
Disaggregation Rules and Policies for Certain)	
Wireless Radio Services)	
)	
Allocation and Designation of Spectrum for)	IB Docket No. 97-95
Fixed-Satellite Services in the 37.5-38.5 GHz,)	
40.5-41.5 GHz and 48.2-50.2 GHz Frequency)	
Bands; Allocation of Spectrum to Upgrade)	
Fixed and Mobile Allocations in the 40.5-42.5)	
GHz Frequency Band; Allocation of Spectrum)	
in the 46.9-47.0 GHz Frequency Band for)	
Wireless Services; and Allocation of Spectrum)	
in the 37.0-38.0 GHz and 40.0-40.5 GHz for)	
Government Operations)	

**PETITION FOR RECONSIDERATION OF COMPETITIVE CARRIERS
ASSOCIATION**

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**PETITION FOR RECONSIDERATION OF COMPETITIVE CARRIERS
ASSOCIATION**

Pursuant to Section 1.429 of the Federal Communications Commission's

("Commission's" or "FCC's") Rules, Competitive Carriers Association ("CCA")¹ respectfully

¹ CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. CCA's membership includes nearly 100

submits this Petition for Reconsideration of certain rules adopted in the Spectrum Frontiers *Report and Order* in the above-captioned proceedings (“*Report and Order*”).²

I. INTRODUCTION AND SUMMARY

As the Commission has consistently recognized, wireless providers need access to more spectrum, and fast. In the *Report and Order*, the Commission sought to “establish a framework that will help ensure continued American leadership in wireless broadband by facilitating access to spectrum, maximizing flexibility, and encouraging wireless innovation.”³ While CCA applauds many aspects of the *Report and Order*, additional measures should be taken to ensure effective and efficient utilization of the spectrum bands above 24 GHz, or the millimeter wave (“mmW”) bands as providers, rural, regional and nationwide, begin to deploy Fifth-Generation (“5G”) networks. Specifically, CCA is concerned that several of the policies adopted in the *Report and Order* will increase consolidation and result in other significant public interest harms such as deterred investment and development in mmW bands. Therefore, CCA requests that the Commission reconsider rules in the *Report and Order* described below.

First, considering the growing need for licensed spectrum and the projected capacity demand 5G networks will support, the FCC should modify licensing rules with respect to the 37-37.6 and 64-71 GHz bands to make available more mmW spectrum for exclusive licensed use.

competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents approximately 200 associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

² *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services et al.*, GN Docket No. 14-177 *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-89 (rel. July 14, 2016) (“*Report and Order*”). The Order was published in the Federal Register on November 14, 2016. *Use of Spectrum Bands Above 24 GHz for Mobile Radio Services*, 91 Fed. Reg. 79,894 (Nov. 14, 2016).

³ *Report and Order* ¶ 3.

Second, the Commission should reconsider its decision to subdivide incumbent local multipoint distribution service (“LMDS”) licenses.⁴ Changing the 28 GHz license size from Basic Trading Area (“BTA”) to county, and changing the 39 GHz license size from Economic Area (“EA”) to Partial Economic Area (“PEA”), will subject incumbent licensees to costly, unexpected service requirements that may be unachievable for those incumbent licensees, especially where the incumbent is a rural provider. This rule change will create a dangerous precedent that could stifle innovation and investment in the future, contravening the public interest.

Third, the Commission should reconsider its adopted mmW spectrum aggregation policies and move to adopt an in-band limit. As recent transactions indicate, under the adopted framework, a carrier can aggregate an entire band of spectrum if it falls under the 1250 MHz limit. This policy hinders competition, will result in increased consolidation and must be reconsidered.

Fourth, the operability requirement for the 37/39 GHz band should be reconsidered. Applying an operability requirement to a band where sharing requirements have not yet been established, and license-by-rule will be implemented, would delay development of standards, equipment and deployment in this band.

Finally, the Commission should reconsider the cybersecurity disclosure requirement adopted in the *Report and Order*. Not only does the adoption of this rule violate the Administrative Procedures Act (“APA”), as the Commission never provided the requisite notice and comment opportunities, but the rule itself discriminates against wireless carriers.

⁴ CCA does not object to the issuance of new county or PEA licenses for these bands; the request for reconsideration is solely limited to licenses held by incumbents.

II. LEGAL STANDARD

A petition for reconsideration is appropriate if it is based on new evidence, changed circumstances, or if reconsideration is in the public interest.⁵ In addition, reconsideration is warranted when a Commission decision contains a material omission or error.⁶ In particular, the Commission must “articulate a satisfactory explanation for” adopting its decision, “including a ‘rational connection between the facts found and the choice made.’”⁷ Accordingly, adopted rules must serve their stated purposes and remedy the harm purported to be addressed; a lack of nexus between the remedy and harm results in arbitrary and capricious decision-making.⁸

As an initial matter, CCA is an “interested person” eligible to petition for reconsideration of the rules adopted in the *Report and Order*.⁹ CCA has been an active participant in the *Spectrum Frontiers* proceeding, filing substantial comments, reply comments and *ex partes*, as well as meeting on several occasions with Commission staff.¹⁰ CCA also filed comments in

⁵ 47 C.F.R. § 1.429(b).

⁶ *In the Matter of Connect Am. Fund*, Third Order on Reconsideration, 27 F.C.C. Rcd. 5622 ¶ 1 (2012).

⁷ *See Motor Vehicle Mfrs. Ass’n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸ *See, e.g., id.* (stating that “under the ‘arbitrary and capricious’ standard . . . the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (quotation omitted).

⁹ 47 C.F.R. § 1.429(a); *see also* 47 C.F.R. § 1.106(b)(1) (“any party to the proceeding, or any other person whose interests are adversely affected by an action taken by the Commission . . . may file a petition requesting reconsideration of the action”).

¹⁰ *See, e.g.,* CCA FNPRM Comments (filed Sept. 30, 2016); Letter from Rebecca Murphy Thompson, EVP & General Counsel, to Marlene H. Dortch, Secretary, FCC (filed July 7, 2016) (discussing a meeting between CCA and Staff of Chairman Wheeler) (“*CCA Wheeler Ex Parte*”); Letter from Rebecca Murphy Thompson, EVP & General Counsel, to Marlene H. Dortch, Secretary, FCC (filed June 30, 2016) (“*CCA Pai/Clyburn Ex Parte*”) (discussing a meeting between CCA and Staff of Commissioners Pai and Clyburn); Letter from Rebecca Murphy Thompson, EVP & General Counsel, to Marlene

response to the Boeing Company's Application to operate a non-geostationary satellite orbit fixed satellite service ("FSS") system which is more appropriately addressed in the *Spectrum Frontiers* proceeding.¹¹ Moreover, CCA and its members will be directly, adversely impacted if the Commission does not reconsider and revise these rules. Therefore, CCA has standing to submit this petition for reconsideration.

The requested limited reconsideration of the rules in this Petition for Reconsideration meets the public interest requirement under Section 1.429(b)(3). As detailed herein, reconsideration of the cited rules below is justified under this standard because the *Report and Order* takes actions that will encourage consolidation and weaken competitive carriers' ability to deploy 5G networks. Policies leading to such an outcome directly contravene the public interest and must be reconsidered to avoid these harms.

III. THE COMMISSION SHOULD MAKE AVAILABLE MORE MILLIMETER WAVE SPECTRUM FOR EXCLUSIVE WIRELESS LICENSED USE

In adopting the *Report and Order*, the Commission sought to "secur[e] the Nation's future in the next generational evolution of wireless technology to...5G."¹² Part of these efforts

H. Dortch, Secretary, FCC (filed July 7, 2016) ("*CCA Rosenworcel/O'Rielly Ex Parte*") (discussing meetings between CCA and staff of Commissioner O'Rielly and Commissioner Rosenworcel); Letter from Rebecca Murphy Thompson, EVP & General Counsel, to Marlene H. Dortch, Secretary, FCC (filed June 29, 2016) (discussing a meeting between CCA, T-Mobile and WTB Staff); CCA NPRM Reply Comments (filed Feb. 29, 2016).

¹¹ See Comments of Competitive Carriers Association, IBFS FILE NO. SAT-LOA-20160622-00058 (filed Dec. 1, 2016); see also *The Boeing Company, Application for Authority to Launch and Operate a Non-Geostationary Low Earth Orbit Satellite System in the Fixed Satellite Service*. IBFS File No. SAT-LOA-20160622-00058 (filed June 22, 2016).

¹² *Report and Order* ¶ 1.

concern making more spectrum available for mobile use. Indeed, “spectrum is the lifeblood”¹³ of the wireless industry, and additional suitable spectrum must be made available for mobile use to foster competition. The Commission has missed its mark by adopting a dynamic shared access regime for the 37-37.6 GHz band, which is ideal for 5G uses, and over-allocating suitable and available spectrum across the 64-71 GHz band for unlicensed, rather than licensed, use. Neither of these policies will further the public interest by “promot[ing] the deployment of [advanced mobile services] in these bands” and instead may hinder innovation and investment in 5G technology. Rather, the Commission should proceed to reallocate the 37-37.6 GHz band on an exclusive licensed basis, or make any sharing regime investment-friendly, and offer a portion of the 64-71 GHz band for exclusive licensed use. Such actions would maximize the spectrum’s technological and financial value, and allow this spectrum to be put to its highest and best use.

a. The Sharing Regime for 37-37.6 GHz Band Will Discourage Investment and Innovation Within Greenfield 5G Spectrum

The *Report and Order* adopted a framework that will make the 37-37.6 band fully available for coordinated co-primary sharing between Federal and non-Federal users, where non-Federal rights are granted by rule.¹⁴ As CCA has previously advocated, this policy severely reduces the value and utility of the 37-37.6 GHz band. This spectrum has some of the highest potential for 5G uses and can be categorized as “the crown jewel of this proceeding because it represents greenfield opportunity;” *i.e.*, it is the only spectrum that can be fully auctioned for new services.¹⁵ However, the Commission’s proposed sharing regime will result in uncertainty,

¹³ Tom Wheeler, Chairman, Fed. Commc’ns. Comm’n., Prepared Remarks at the Int’l Institute of Commc’ns. Annual Conference, p. 5 (Oct. 7, 2015) *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-335877A1.pdf.

¹⁴ *Report and Order* ¶ 111.

¹⁵ *CCA Wheeler Ex Parte* at 3.

since potential licensees do not yet know how their access may be affected by other users. Such uncertainty deters investment and discourages innovative testing and deployment of the spectrum.

In addition to certainty, carriers need enough flexibility when making an investment in spectrum to adjust to changing technologies, the evolving marketplace, demand trends and other considerations. Adding a spectrum sharing mechanism on top of these considerations could negatively impact both a carrier's business model and its ability to invest in equipment and services that may take time to develop. This is particularly true for the upper mmW bands, as new business use cases and models may arise throughout license terms, and carriers need to be able to adjust without the unnecessary complications associated with a yet-to-be tested sharing model.

Ideally, the Commission should reconsider its policy and license this spectrum for exclusive commercial wireless use to maximize its greatest financial and technological value. In the alternative, CCA requests that, at a minimum, the Commission should refrain from requiring two commercial parties to share and should only subject licensees to sharing arrangements between commercial and federal users when practical and technically feasible, a model that has at least been tested in the past.¹⁶

b. Unlicensed Spectrum Allocations Across the Entire 64-71 GHz Band May Harm Mobile Terrestrial 5G

The Commission erred by allocating the entire 64-71 GHz band for unlicensed use. While CCA has supported freeing up more spectrum for both licensed and unlicensed uses,¹⁷ the

¹⁶ The Commission should take into account past successes with respect to mobile carriers coordinating with federal users in the AWS-1 spectrum and current successful efforts to coordinate use of AWS-3 spectrum. *See id.*

¹⁷ CCA NPRM Reply Comments at 9, 12 (filed Feb. 29, 2016).

Commission in the *Report and Order* allocated far less 5G spectrum than expected for exclusively licensed use.¹⁸ Specifically, the Commission's adopted policies would make available almost twice the amount of unlicensed spectrum as licensed spectrum in the mmW bands; of the 10.85 GHz of spectrum unleashed by the *Report & Order*, only 3.85 GHz of spectrum is available for licensed use. Worse, of the 3.85 GHz of spectrum designated for licensed use, most is already licensed to incumbent entities. The Commission should take this opportunity, on reconsideration, to provide the requisite amount of licensed spectrum for 5G uses.

Considering the growing need for licensed spectrum and the projected capacity demands of 5G, the Commission should more evenly allocate the 64-71 GHz band. Even very high mmW spectrum has potential for licensed mobile use,¹⁹ and allocating as little as 5 GHz for licensed mobile use at the top of the 64-71 GHz band would promote the public interest by greatly improving the prospects for competitive carriers looking toward mmW spectrum to bolster their networks. Moreover, doing so will also enrich the market for unlicensed services because technology and infrastructure development will be facilitated by the introduction of licensed wireless systems to this band.²⁰ By dedicating additional spectrum for licensed use, the Commission will help ensure a marketplace for unlicensed devices in the same or similar spectrum band.

¹⁸ See *Report and Order* ¶ 130.

¹⁹ George R. MacCartney, Jr., *et al.*, *Millimeter Wave Wireless Communications: New Results for Rural Connectivity*, PROCEEDINGS OF THE 5TH WORKSHOP ON ALL THINGS CELLULAR: OPERATIONS, APPLICATIONS AND CHALLENGES, pp. 31-36, at 31 (2016), available at <https://arxiv.org/abs/1608.05384>.

²⁰ See, e.g., Letter from Steve B. Sharkey, Vice President Government Affairs, Technology and Engineering Policy, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, at 4 (filed June 30, 2016) ("*T-Mobile June 30 Ex Parte*").

IV. INCUMBENT LMDS SPECTRUM LICENSES SHOULD RETAIN THEIR ORIGINAL GEOGRAPHIC LICENSE SIZE

Although CCA has long advocated for smaller geographic license sizes, the Commission should reconsider its decision to subdivide incumbent LMDS licenses. In the *Report and Order*, the Commission adopted counties as the license size for Upper Microwave Flexible User Service (“UMFUS”) licenses in the 28 GHz band, which is currently licensed by BTA, and adopted PEAs for 39 GHz licenses, which are currently licensed by EA.²¹ CCA has opposed this policy with respect to incumbent licensees as it will harm those incumbents, especially rural and regional carrier licensees.²² In this instance, adopting smaller license areas for incumbents will increase administrative burdens and costs to meet impractical buildout requirements for each new license that the incumbent licensee would suddenly hold when the rule takes effect, not to mention lost investment in this spectrum.

A carrier should not be forced to deploy needless infrastructure to maintain its license when it has already invested financial and human resources towards deploying and meeting its existing buildout requirement.²³ Worse, many small and regional carriers simply do not have the resources available to comply with the increased buildout requirements, and will likely lose their

²¹ *Report and Order* ¶¶ 35, 82.

²² *CCA Wheeler Ex Parte* at 3.

²³ Nextlink has described how this rule might greatly increase the expense of holding an LMDS license. As of June 3, 2016, Nextlink held 93 LMDS licenses, but under the Commission’s licensing change, it would hold 767 county-based licenses. Nextlink has explained that to meet substantial service requirements for its licenses on a county-by-county basis, significant costs including both capital expenditures and ongoing operating expenditures would be required for each new site that Nextlink would have to deploy in a county. Upfront costs include “the purchase of radios, fiber connectivity, telemetry routers, as well as construction, permitting and real estate fees.” Most troubling, Nextlink estimates that the upfront costs may total in the tens of millions of dollars. See Letter from Michele C. Farquhar, Counsel to Nextlink Wireless, LLC and XO Communications, LLC to Marlene H. Dortch, Secretary, FCC, at 3 (filed June 3, 2016).

licenses. To erase any doubt, CCA and one of its rural members, the Central Texas Telephone Cooperative, Inc. (“CTTC”) met with various offices at the Commission to explain why maintaining CTTC’s largely rural service footprint—under two BTA-based LMDS licenses—is “untenable” if CTTC must comply with new buildout requirements for the 19 counties in those two BTAs.²⁴ As CTTC described, many rural carriers serve unpopulated areas, and therefore installing points of presence (“POPs”) or links as described in the *Report and Order* would be a wasted expense.²⁵ However this does not, as the Commission appears to assume, justify the loss by a rural carrier of an “empty” county within its licensed BTA;²⁶ a rural area may become populous, or in time host productive farmland or facilities that would greatly benefit from enhanced spectrum use.²⁷ In such an event, the rural carrier licensee should be able to exercise their rights to build on their investment and appropriately expand their network.

New license sizes for incumbents are further complicated by technological barriers to deploying mobile terrestrial networks with LMDS spectrum. As discussed by CCA members CTTC and C Spire this summer, many regional and rural carriers use LMDS spectrum for backhaul and point-to-point services; even if they would prefer to launch a mobile network or bolster their existing mobile network, those carriers are unaware of technologies that would

²⁴ CCA *Wheeler Ex Parte* at 4; CCA *Pai/Clyburn Ex Parte*; CCA *Rosenworcel/O’Rielly Ex Parte*.

²⁵ *Id.*

²⁶ In the *Report and Order*, the Commission recognized that it may not be “economically viable” for some incumbent LMDS licensees to meet the increased buildout requirements associated with counties, and in such a case “it would be appropriate to give other interested parties an opportunity to license and make use of that spectrum.” *Report and Order* ¶ 35.

²⁷ CCA *Wheeler Ex Parte* at 4.

accommodate mobile terrestrial service over LMDS spectrum in rural, flat lands.²⁸ Therefore, increasing performance requirements would result in sunk costs for carriers who have already installed equipment sufficient to serve their existing coverage area.

Changing the geographic area sizes for incumbent LMDS licenses is flawed policy that certainly is not in the public interest. A small or rural incumbent carrier should not be penalized by the Commission for not meeting an additional, after-the-fact buildout requirement when it has already invested significant resources in deploying and meeting its original buildout requirement. Furthermore, even if a carrier is able to afford to maintain its new county- or PEA-based license, it will be using funds that are being diverted from developing and deploying 5G in the near term. This outcome directly contravenes with the public interest, and the goals of this proceeding. Accordingly, the Commission should reconsider its decision to subdivide incumbent LMDS licenses.

However, if the Commission does not reconsider its decision to subdivide existing LMDS licenses in the 28 and 39 GHz bands, most of the public interest harms discussed above could be avoided if the Commission exempts incumbent these licensees from any and all new performance requirements. This would allow the Commission to meet its goal of effectively utilizing these bands without wasting the resources of incumbent licensees.

In the alternative, the Commission may require incumbent licensees to meet buildout requirements for only one county within an existing licensed BTA. This too would reduce the amount of resources that incumbent licensees would be required to divest, as well as ensure that the licenses are being utilized.

²⁸ *See id.*

V. AN IN-BAND AGGREGATION LIMIT MUST BE IMPLEMENTED TO ENSURE A COMPETITIVE MARKET FOR 5G SPECTRUM

The *Report & Order* established an *ex ante* spectrum aggregation limit of 1250 MHz for auctioned spectrum in the 28 GHz, 37 GHz and/or 39 GHz bands and for case-by-case review of secondary market transactions in these millimeter wave bands.²⁹ While this is a helpful start to combating anti-competitive actions, the Commission should proactively prevent in-band aggregation by adopting spectrum aggregation limits in each disparate mmW band, as well as in the aggregate.

The Commission must consider how mmW spectrum has the ability to help promote competition for 5G development. But the FCC must promote competition within each band for its aggregation policy to be effective. For example, under the current rules adopted in the *Report and Order*, one carrier has the ability to aggregate all 850 MHz of the 28 GHz band.³⁰

This is not an illusory concern. The wireless industry has seen numerous instances of bands monopolized by larger carriers. For instance, AT&T and Verizon originally received a

²⁹ *Id.* ¶ 184.

³⁰ Indeed, the recent transaction between Verizon and Nextlink (“XO”) demonstrates that a ‘one-third’ overall aggregation limit is not sufficient to prevent monopolization of 5G-capable spectrum: Verizon was approved to lease XO’s licenses covering 65% of the POPs for the LMDS service band (27.5-28.35 GHz, 29.1-29.25 GHz, and 31.0-31.3 GHz) in the top 60 markets nationwide with a potential option to acquire all of such spectrum from XO. *See Application of Cellco Partnership d/b/a Verizon Wireless and Nextlink Wireless, LLC For Consent to Long-Term De Facto Transfer Spectrum Leasing Arrangement*, ULS File No. 0007162285, Memorandum Opinion and Order, DA 16-838 (WTB 2016). That transaction is a significant step in the direction of anti-competitive aggregation of mmW spectrum, and similar transactions must be reviewed closely for anti-competitive harm if 5G is to be competitively administered in the United States. Several stakeholders, including CCA, voiced concerns that the transactions would result in the consolidation of key high-band spectrum and critical wireline resources, thus having a detrimental impact on competitive 5G testing and deployment, which is in direct contravention of the goals in this proceeding. *See, e.g.*, Letter from Rebecca Murphy Thompson, EVP & General Counsel, to Marlene H. Dortch, Secretary, FCC (filed June 7, 2016); Comments of CCA, WC Docket No. 16-70 (filed May 12, 2016).

head start on competition in the wireless industry when they were permitted to obtain the majority of suitable and available cellular licenses. AT&T was later provided a “first mover advantage” with respect to the 700 MHz A Block, which was effectively limited to AT&T in an interoperability-free marketplace. Now these two carriers account for approximately two-thirds of connections (approximately 270 million connections) and control over 71% of the wireless market.³¹ Without adopting appropriate competitive protections at the outset, the largest two carriers may be allowed to continue down this path again.

Failure to protect against spectrum aggregation will harm competitive carriers who need access to upper mmW bands to deploy competitive offerings to consumers. Therefore, to adequately protect against anti-competitive aggregation of mmW spectrum, while also accommodating technical challenges between bands, the Commission should adopt a two-tiered approach as suggested by CCA for evaluating mmW spectrum aggregation: (1) a true one-third screen for all licensed mmW spectrum;³² and (2) a one-half screen for licensed spectrum in a particular band. This two-tiered approach should apply to secondary market transactions, in addition to licenses acquired by competitive bidding. Utilizing spectrum aggregation limits on an in-band basis will allow the Commission to tailor the applied limit depending on the best use case for each band, and prevent anti-competitive aggregation of a single band.

The fact that there will be additional spectrum potentially made available as a result of the *Further Notice* is yet another reason the Commission should add an in-band limit. Each

³¹ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Nineteenth Report, DA 16-1061, ¶¶ 14, 19 (2016)

³² To the extent that the 37-37.6 GHz band is “licensed-by-rule,” this spectrum should not be included in determining a one-third spectrum limit. Excluding this spectrum would bring the screen to approximately 1100 megahertz. *See Report and Order* ¶ 111.

mmW band is different, and will likely have different technical requirements and best use cases. Accordingly, an in-band limit is necessary for both currently allocated millimeter wave spectrum and millimeter wave bands that will be allocated in the future.

VI. AN OPERABILITY REQUIREMENT ACROSS THE 37/39 GHZ BAND AT THIS TIME WILL RESULT IN PUBLIC INTEREST HARMS

The *Report and Order* also establishes an in-band operability requirement across the 37/39 GHz band for mobile and transportable equipment.³³ The 37-37.6 GHz band (the “lower 37 GHz band”) will be available on a shared basis between federal and non-federal users, yet the Commission has not decided the exact contours of that sharing arrangement.

While CCA has advocated for operability that will promote competition and innovation, such as in the 28 GHz band, imposing this requirement through the entire 37/39 GHz band before a sharing regime for the lower 37 GHz band is determined would delay equipment development, investment, and deployment across the entire band.³⁴ CCA members have explained that “mandat[ing] operability for fixed technologies and across the entire portion of the 37-40 GHz band, . . . could make certain equipment obsolete and untimely delay 5G deployment.”³⁵ Therefore, to prevent these consequences, Commission should reconsider its operability requirement and exclude the 37-37.6 GHz band from the operability requirements while the sharing regime is being finalized and until there are rules governing the band.³⁶ At a

³³ *Report and Order* ¶ 321; *see id.* at ¶ 323 (“[F]or the 37 GHz and 39 GHz bands, a device operating in either band must be capable of operating across the entirety of both bands, from 37 GHz to 40 GHz (including the 37-37.6 MHz lower block)”).

³⁴ *CCA Wheeler Ex Parte* at 3; *see also T-Mobile June 30 Ex Parte*.

³⁵ *CCA Wheeler Ex Parte* at 3.

³⁶ Moreover, as the Commission recognizes, there was a great deal of confusion “among commenters as to what type of operability” was being proposed by the Commission (*i.e.*, all devices be compatible with all air interfaces, in addition to all frequencies in the band). The FCC clarified its stance in the *Report and Order* while adopting its rule

minimum, the Commission should refrain from requiring operability throughout the entire 37/39 GHz bands until such rules are adopted.

VII. THE *REPORT AND ORDER* IS AN INAPPROPRIATE VEHICLE FOR CYBERSECURITY DISCLOSURE REQUIREMENTS

The *Report and Order* requires mmW licensees to submit a statement prior to commencing operations addressing how confidentiality, integrity and available principles are reflected in their security design principles, as well as the provider's "participation in cybersecurity standards and practices."³⁷ CCA urges the Commission to eliminate this misguided requirement as, first, the Commission violated the APA by failing to propose this rule in the *Notice of Proposed Rulemaking*, and therefore denying CCA and other interested parties an opportunity to object on the public record.³⁸ Also, the cybersecurity requirements will saddle carriers with administrative and competitive burdens. Accordingly, this requirement should be reconsidered and rejected.

The APA dictates that the Commission may promulgate new legislative rules that "create new law, rights, or duties,"³⁹ but only after following the procedures set forth in Section 553 of the APA.⁴⁰ Generally, this is accomplished through a Notice of Proposed Rulemaking that "provide[s] sufficient factual detail and rationale for the rule to permit interested parties to

concerning operability. Therefore, it is arguable whether parties were able to offer appropriate initial arguments and whether a valid record on this issue was available for Commission consideration of this issue.

³⁷ *Report and Order* ¶ 262-63.

³⁸ See 47 C.F.R. § 1.429(b).

³⁹ *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991).

⁴⁰ See 5 U.S.C. § 553 (providing for general notice of proposed rulemaking to be published in the Federal Register, along with the opportunity for interested parties to participate in the rulemaking through the submission of comments).

comment meaningfully.”⁴¹ In this instance, the FCC failed to propose a comprehensive cybersecurity disclosure requirement in the *Notice of Proposed Rulemaking*. Similarly, commenting parties also did not introduce such a proposal or otherwise recognize a need for such reporting requirement in this proceeding.⁴² There simply is no support in the record for the adopted cybersecurity requirement, and the Commission fails to provide any reasoning to demonstrate otherwise. On that basis alone, this requirement must be rejected.

In addition, the obligations that will be imposed on mmW licensees are discriminatory and against the public interest as there are no similar obligations currently imposed on licensees in other spectrum bands or on wireline providers. Further, there is no record evidence that mmW technology poses a higher risk than any other use of spectrum. The Commission also fails to offer an explanation as to why it tasks licensees with this requirement when there are many other actors that play large roles in the security infrastructure of wireless service. Licensees, especially wireless licensees, are not the appropriate party to make cybersecurity disclosures. Rather, OEMs are in the business of constructing and selling network infrastructure and would be in the best position to provide security information. The Commission should eliminate the cybersecurity statement rule.

⁴¹ *Honeywell Int’l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004).

⁴² *Cf. Use of Spectrum Bands Above 24 GHz For Mobile Radio Services*, GN Docket No. 14-177, et al., *Notice of Proposed Rulemaking*, 30 FCC Rcd 11878 (2015).

VIII. CONCLUSION

CCA respectfully requests that the Commission reconsider certain decisions as described herein to promote the public interest and ensure that the mmW spectrum is used efficiently and effectively to meet next-generation demands.

Respectfully submitted,

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